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Supreme Court of the United States

October Term, 1999

ANDREW S. NATSIOS, SECRETARY OF ADMINISTRATION AND FINANCE OF THE COMMONWEALTH OF MASSACHUSETTS, AND PHILMORE ANDERSON, III, STATE PURCHASING AGENT,
Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF COALITION FOR LOCAL SOVEREIGNTY IN SUPPORT OF PETITIONER

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STATEMENT OF CASE

The Commonwealth of Massachusetts has adopted a policy of giving preference in state contracts to companies which do not do business in Burma. Does a state or local government's decision to have purchasing decisions reflect the community's disapproval with the actions of domestic companies or foreign governments violate any constitutional restriction?

INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state and local officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner, Commonwealth of Massachusetts, and counsel to the respondent, National Foreign Trade Council, have consented to the filing of this *amicus* brief.

SUMMARY

The traditional standard for determining the constitutionality of a local policy which has some effect on foreign countries was expressed quite clearly in *Clark v. Allard* (331 US 303) which ruled that the California statute being contested as an exercise of alleged foreign policy "will have some *incidental or indirect effect* in

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

foreign countries. But that is true of many state laws which none would claim cross the forbidden line."

The First Circuit decision, in effect, rejects this standard, ruling that a local law which has only "indirect effect" on foreign countries is unconstitutional. If upheld this new standard threatens "many state laws which none would [otherwise] claim cross the forbidden line."

The decision of the Appeals Court infringed upon the constitutionally protected autonomy of state and local government in several important areas:

1) The decision considers all matters "relating to foreign commerce" as areas of exclusive federal legislation. There are very few things (if anything) which is not in some way related to foreign commerce. Like the argument that anything the least bit "related to interstate commerce" is an area of federal jurisdiction, such a broad interpretation threatens to bring everything under federal jurisdiction and transform the federal government from one of limited jurisdiction into one of unlimited jurisdiction.

2) The decision takes an extreme position that the United States must "speak with one voice" and that state and local governments may not do anything which might be "embarrassing" to the United States on the international level. This reading threatens to undermine a whole host of activities traditionally carried on by local governments and their leaders. Sister-city and sister-state programs, unofficial negotiations of governors and mayors with foreign leaders for investment, and even state and local resolutions expressing the sense of the legislature on matters of international concern are all seemingly condemned by *NFTC*. Since Virginia and Kentucky passed Resolutions condemning the Alien and

Sedition Acts of 1798 it has been established that the states have an important role to play in the foreign policy debate. That local governments may make statements or take actions which are embarrassing to the US government is part of living in a free society.

3) The decision takes the radical step of suggesting that federal laws preempt local laws on the same topic, even when there is no contradiction between the two. With few exceptions, it has always been understood that state and local laws have force so long as they do not contradict a valid federal law. Such a radical interpretation threatens to seriously undermine the decision-making ability of local governments.

4) The First Circuit declares that "the Commonwealth has crossed the line from market participant to market regulator." Not only is this based on an absurdly stretched definition of "regulation" (on which the entire decision rests) but it threatens to undermine purchasing decisions of all sorts. For example, when state boards of education approve certain guidelines for textbooks (especially if it is a large state) book publishers invariably change the content of their books to conform. These same text books are usually sold to schools in other states. The NFTC decision would have us conclude that such actions constitute an impermissible attempt to "REGULATE conduct beyond its borders." The fact is that purchasing decisions by large consumers (whether states or large companies) affect production and distribution decisions in other states and other countries. An upholding of the position of the First Circuit could subject local governments to frivolous lawsuits for almost any purchasing decision.

ARGUMENT

I. Framers viewed the States as having an important role in the foreign policy debate and saw the foreign powers of the federal government as not extending to internal, domestic issues.

In 1798 when Congress passed the Alien and Sedition Acts, James Madison and Thomas Jefferson authored Resolutions in Kentucky and Virginia which declared that these Acts could not be enforced in either state. Many people at the time regarded these actions by the states as interference in foreign affairs that ought to be left up to Congress. While the Supreme Court never ruled on either the Acts or the Resolutions, the subsequent election of Jefferson and Madison to the presidency, and the judgement of history has been that they were right to oppose these Congressional excesses.

These resolutions also expressed the unequivocal view of Madison and Jefferson that, whatever powers the federal government might possess to engage in foreign policy, those powers did not extend to the regulation of affairs internal to the states themselves.

To cite just one example, Jefferson declared in the Kentucky Resolutions that "alien friends are under the jurisdiction and protection of the law of the State wherein they are: that no power over them has been delegated to the United States." Madison and Jefferson did not question that the federal government had jurisdiction to set rules for naturalization -- the provisions extending the length of time a person had to reside in the United States before becoming a citizen they did not like, but never challenged as unconstitutional. Other than the naturalization provision Madison and Jefferson rejected the idea that Congress could deport aliens for criticizing

US policy, or that the federal government possessed any jurisdiction for regulating the conduct of aliens once they took up legal residence in the United States.

The Virginia and Kentucky Resolutions are also of great significance in the current debate because they help to put into better context certain writings of Madison in the Federalist Papers which the Appeals Court has cited -- incorrectly -- in support of its ruling. The First Circuit decision cited Madison's words that "'[t]he powers delegated by the proposed Constitution to the federal government are few and defined' and 'will be exercised principally on external objects, as war, peace, negotiation and foreign commerce.'" It is almost inconceivable that anyone could take these words as supporting the court's opinion, but so the majority opinion suggests.

There can be little doubt, when Madison's writings elsewhere are taken into account -- especially the above cited Resolutions -- that what Madison means by "external objects" certainly do not extend to matters which occur inside the boundaries of the States.

Again citing a statement of Madison out of proper context the court takes as a major support for its position the phrase that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations" (Fed 42). Once again, however, it is quite clear that Madison is referring to external functions and policies, and certainly not to matters internal to the States.

Similar statements by Alexander Hamilton are also twisted by the First Circuit in an attempt to support its ruling. The First Circuit noted Hamilton's view that "the Articles of Confederation, by failing to contain any 'provision for the case of offences against the law of nations,' left 'it in the power of any indiscreet member to embroil the Confederacy with foreign nations.'"

Hamilton is discussing acts of piracy or terrorism which are protected by a country's refusal to prosecute them. Throughout history there have been cases such as that which started the First World War, when Serbia refused to prosecute a terrorist, and today with Libyan terrorists which the Libyan government protected. This sort of violation of the law of nations is so far removed from the sort of action being carried on by Massachusetts in the current case as to be almost laughable in comparison.

II. States may exercise any power which is not "absolutely and totally CONTRADICTORY and REPUGNANT" to powers exercised by Congress.

Any fair reading of the Constitution makes plain that the setting of a state's purchasing decisions is a power entirely reserved to the state. (Indeed, a strict reading of the Constitution -- and the explicit statement of Madison and Jefferson in the Resolutions -- demands that while the federal government may be able to declare an embargo on a foreign country, and it may attempt to stop the importation of such goods into the United States, nevertheless, once having arrived here the federal government possesses no police power to prosecute any person or entity for purchasing those goods on the domestic market.)[2]

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[2] "The Constitution of the US, having delegated to Congress power to punish treason, counterfeiting the securities and coin of the United States, piracies and felonies on the high seas, and offenses against the law of nations, and no other crimes whatsoever, all other acts which assume to create define or punish crimes, other than those So enumerated in the Constitution are altogether void, and of no force." Kentucky Resolution of 1799.

Hamilton in the *Federalist Papers* lays out quite clearly to what extent state sovereignty is reserved under the new Constitution:

> the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: [1] where the Constitution in express terms granted an exclusive authority to the Union; [2] where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and [3] where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally CONTRADICTORY and REPUGNANT [emphasis original].

Hamilton then immediately continues, and should be highlighted because it seems to describe precisely what is at issue in the current case:

> I use these terms [absolutely and totally CONTRADICTORY] to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the POLICY of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority.

Hamilton's words here have immediate and obvious application to the current case. That a state policy may produce embarrassment to the US government or produce "occasional interferences in the POLICY" of the US government does not invalidate state sovereignty.

As if the authority of *The Federalist* is not sufficient we might also note that this specific tripartite scheme of determining whether or not a grant of power is exclusive to the federal government has also been affirmed by this Court, most notably in *Gibbons v. Ogden*.[3]

The First Circuit opinion relies upon the premise that the exercise of article 1 section 8 foreign powers by Congress is contradictory to any similar power in the states. Article 1 section 10, as authoritatively interpreted by *Gibbons*, indicates otherwise. As the Court noted in *Gibbons* "limitations of a power furnish a strong argument in favor of the existence of that power, and the section [I, 10] which prohibits the states from laying duties on imports or exports, proves that this power might have been exercised, had it not been expressly forbidden."[4]

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[3] "An affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant" (*Gibbons v. Ogden*, 9 Wheat. 1, 6).

[4] Hamilton makes a similar comment in Federalist 84 noting: "why declare that things shall not be done which there is no power to do . . . the Constitution ought not be charged with the absurdity of providing against an abuse for which no power is given." These comments were made in noting why a "Bill of Rights" was unnecessary, but show the attitude of Hamilton and the other Framers

Again, this Court said that the various prohibitions on state actions contained in article 1 section 10 are actions which are not prohibited by the positive enumeration of similar powers to Congress in Article 1 section 8, and could have been exercised by the states if not specifically prohibited by I, 10.

What are some of these restrictions found in I, 10: "No state shall enter into any Treaty, Alliance or Confederation; grant letters of Marque and Reprisal . . . lay any Imposts or Duties on Imports and Exports." *Gibbons* noted that "a state might impose duties on exports and imports, if not expressly forbidden [by 1, 10]."

If as this Court ruled in Ogden, neither the "foreign commerce power" nor the treaty making power of Congress prohibit a state from making treaties or imposing duties then all the more it must be true that the type of activity under dispute in the current case cannot possibly run afoul of the foreign commerce clause or the foreign policy powers of Congress.

This analysis of Art 1 section 10 makes clear the nature of what Hamilton and the other Framers believed was is "absolutely and totally CONTRADICTORY and REPUGNANT."

I, 8 gives Congress power "to grant letters of marque and reprisal, and makes rules concerning captures on land and water, and to levy imposts and duties. But these things were then later prohibited to the states by section 10, showing that the Framers did not think that the exercise of such powers by the states was "absolutely and totally CONTRADICTORY and REPUGNANT" to those powers granted to Congress.

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that explicit prohibitions were unnecessary – and even dangerous – unless targeted to otherwise existing powers.

The prohibition on states levying imposts or making treaties is not based on section I, 8 (as the First Circuit seems to suggest) but is based upon I, 10. Any challenge to the Massachusetts Burma law as unconstitutional will need to based upon an interpretation of I, 10 – and such an argument cannot be made.

III. State policy must DIRECTLY affect foreign countries to be regarded as engaging in foreign policy.

***1. Clark v. Allard* affirms indirect standard**

The case most similar to the present one, and the most important precedent for it is clearly *Clark v. Allard*. As now, a state statute which sought to "promote" or encourage certain policies in foreign countries was challenged. As the Court summarized it:

> The challenge to the statute is that it is an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government. ... The argument is that by this method California seeks to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California. Such an offer of reciprocal arrangements is said to be a matter for settlement by the Federal Government on a nation-wide basis.

The Court in *Clark*, however, not only rejected this argument, but even ridiculed it, ruling:

> In *Blythe v. Hinckley*, California had granted aliens an unqualified right to inherit property within its borders. ... The argument was that a grant of rights to aliens by a State was, in absence of a treaty, a forbidden entry into foreign affairs. The court rejected the argument as being an extraordinary one. The objection to the present statute is equally far fetched.

This Court concluded that "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line."

The ruling in *Clark*, therefore, is that even in cases where a local statute is designed to promote or change certain policies of other countries, such statutes are perfectly constitutional so long as the laws result in EITHER incidental OR indirect effect in foreign counties.

The First Circuit opinion while purporting to accept this standard states repeatedly that the action of Massachusetts is "more than incidental or indirect." This statement indicates that the First Circuit either does not know the meaning of the word "or" or else it does not know the meaning of the word "indirect." The word "or" is a conjunction denoting alternatives. The First Circuit appears to hold the Massachusetts law up to a standard that the effect must be BOTH incidental AND indirect. This is clear misreading of *Clark*.

Alternatively, the First Circuit must not understand the meaning of the word "indirect" for it is impossible for a cause to be "more than indirect." Logically a cause is either direct or indirect. It does not seem that anyone maintains that the Massachusetts policy has any DIRECT effect on conditions in Burma. It directly affects companies that wish to do business with the Commonwealth, and these companies may in turn may decide not to do business in Burma. Thus any effect

of the Massachusetts law on Burma can only be said to be "indirect."[5]

***2. ZSCHERNIG v. MILLER* (389 U.S. 429) upholds the "indirect" standard.**

The ruling in *Zschernig* upholds the standard that state laws are constitutional which have only an indirect effect in foreign nations. The ruling in *Zschernig* concluded specifically that "The present Oregon law . . . has a *direct* impact upon foreign relations." (Emphasis added) The penultimate sentence of the opinion thus declares unequivocally that the effect of the law in dispute there was "direct," thus running afoul of *Clark's* standard that laws which "indirectly" affect foreign policy are permissible.

A quick summary of the issues in *Zschernig* shows both the fundamental difference with Massachusetts' Burma Law, and also clarifies what sorts of things might qualify as engaging in "foreign policy." The Oregon law in *Zschernig* applied only to the transmittance of property to nonresident aliens, thus it only applied directly to persons outside of the country. The opinion in *Zschernig* suggested that the specific areas where the state of Oregon trespassed on powers ceded to the federal government was in "*the control of the international transmission of property, funds, and credits, and the capture of enemy property.*"

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[5] A cause is direct when it brings about an effect immediately, necessarily and without intermediary. While the Massachusetts policy is designed to affect the action of Burma it depends upon the action of intermediaries to accomplish that end. Philosophers also speak of direct and indirect causes as "proper or remote" and as "per se or accidental."

In stark contrast, the Massachusetts law does not affect "the international transmission of property, funds, and credits, [or] the capture of enemy property" rather it affects only businesses "within" Massachusetts. The California law challenged in *Zschernig* "directly" (and, in fact, exclusively) affected persons in other countries. The Massachusetts law is exactly the opposite, and hence is in full conformity with the ruling in *Zschernig*.

IV. This Court in the past has carefully protected the autonomy of local communities, to make decisions such as in the Massachusetts Burma Law.

Clark and *Zschernig* were both careful to protect traditional spheres of state and local autonomy. *Zschernig* noted that:

> State courts, of course, must frequently read, construe, and apply laws of foreign nations. It has never been seriously suggested that state courts are precluded from performing that function, albeit there is a remote possibility that any holding may disturb a foreign nation - whether the matter involves commercial cases, tort cases, or some other type of controversy.

State actions and policies will inevitably effect foreign countries, but it is certainly true that "it has never been seriously suggested" by this Court that states must refrain from any policy or law which "may disturb a foreign nation."

Mere protest from some foreign country does not indicate in any way that a state has intruded into foreign affairs. It may rather indicate that a foreign country has intruded into our domestic affairs. For example, many

countries have protested the use of capital punishment in the United States. Sometimes, this may be with respect to a foreign national, or simply an objection to capital punishment in general. It has never been seriously suggested that if a state chooses to mete out capital punishment that it is engaging in foreign policy.

V. The First Circuit ruling threatens to undermine many areas of lawmaking which this Court has previously ruled as being the exclusive province of the States.

1. Alleged Unlimited Nature of Foreign Policy would dissolve the distinction between what is internal and what is external.

Capital punishment provides a good example for discussing the so-called "unlimited" nature of the US government's foreign policy. It is certainly the case that the use of capital punishment by the states (and the federal government) has caused friction with other nations. It might be that a foreign nation may refuse to extradite an accused criminal because of the possibility of a death sentence. It would seem to be an appropriate exercise of the treaty making power of the federal government to enter into an extradition treaty which guarantees that no person extradited to the United States will be executed. It would, however, go well beyond the treaty making powers of the federal government to enter into a treaty which simply prohibits capital punishment in every case. That would be an intrusion into an area of criminal punishment reserved to the states. The first case is a matter of international cooperation, the second would simply be an end run around the Constitution in the name of an international treaty. The president and the Senate,

of course, may not make a treaty pledging to do something which is prohibited by the Constitution -- such as nullifying the First, or even the Tenth, Amendment.

Various international treaties, if taken to supercede local laws, could all but eliminate local decision making in dozens of areas constitutionally reserved "to the States or to the people." Local control of education, law enforcement, criminal punishment, and welfare could all be undermined in the name of international law. It has been seriously argued that the International Covenant on Civil and Political Rights overrules state sodomy laws (which were, of course, explicitly upheld by this court in *Bowers* 478 US 186 (1986). [6]

Similarly it has been argued that the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, ruling by the International Court of Justice can overrule both state and federal laws. The potential disruption of local decision making is enormous if one were to accept that internal, domestic policies can be challenged based on such international treaties.

The First Circuit opinion declares that "when it comes to foreign affairs the powers of the federal government are not limited" and appeals to *US v. Curtiss-Wright Export* (299 US 304). However, this Court's opinion in Curtiss noted that "The whole aim of the [Congressional] resolution is to affect a situation

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[6] *See, e.g.*, Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: a Head-On Collision with* Bowers v. Hardwick, 58 ALB. L. REV. 725, 771-73 (1995).

entirely external to the United States, and falling within the category of foreign affairs" (emphasis added). The First Circuit casts such an expansive understanding of "foreign affairs" that it included not only those things "entirely external to the United States" but extends even to domestic affairs which are entirely internal to a specific state.[7]

The majority opinion in *Curtiss* then, proclaimed that "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations

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[7] Although the current case does not contradict *US v. Curtiss*, it should be noted that the reasoning in *Curtiss*, namely, that the US government did not receive its foreign affairs powers from the Constitution, and therefore is not limited to any cession of power received from the states, is based on a demonstrably false historical premise. *Curtiss* asserted that:

> By the Declaration of Independence, 'the Representatives of the United States of America' declared the United (not the several) Colonies to be free and independent states, and as such to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.' As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.

The wording of the Declaration is undoubtedly plural: "these United Colonies [plural] are and of right ought to be free and independent states [plural]; that they [plural] are absolved from all allegiance . . . they [plural] have full power to levy war, conclude peace" and so forth. Moreover it is an historical fact that each of the colonies separately issued their own proclamations of independence, and moreover, that under the Treaty of Paris, the British crown granted independence to each of the colonies individually and recognized "them" to be "free, sovereign and independent states."

with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." It seems a dangerous precedent to proclaim that the federal government may possess various unenumerated powers which are "necessary concomitants of nationality." The First Circuit suggests that power to nullify local purchasing decisions may be one of them. This Court in *Curtiss*, of course, limited those things "concomitant with nationality" to several specific and enumerated powers. The attempt of the First Circuit is to create further "hidden powers" which effect the internal affairs of states.

While the decision in *Curtiss* does not run afoul of the Massachusetts law under dispute here, the doctrine posited therein is an ill thought out one, based upon a flawed historical understanding and an openly extra-textual interpretation of the Constitution unsupported by any writings of the framers. This Court may well take the opportunity to repudiate *Curtiss*.

Despite serious problems with *Curtiss*, it does contain the truth that the powers of the federal government differ greatly between internal and external affairs (as for example between banning executions for those extradited, versus banning execution generally). Obviously, protections for US citizens to life, liberty and property do not apply to enemy combatants in a war zone. The First Circuit, however, tries to negate the difference between what is internal and what is external, by appealing to a more expansive vision of "foreign affairs" which includes much that is internal, if not everything which in some way "affects foreign affairs."

2. Expansive Reading of Foreign Commerce Clause runs afoul of this court's recent narrow reading of interstate commerce clause.

The First Circuit has, in effect, set up an expansive standard that anything which "affects" foreign policy is an area of legislation prohibited to the states. This seems little more than an attempt to apply the same expansive reading of the "interstate commerce clause" which this court has recently rejected and which is being considered this term in *Brzonkala v. Virg. Tech.* This Court in *Lopez* (514 US 549) declared that activities which are purely internal to a state cannot be regulated by the federal government under the guise of regulating commerce among the states or with foreign nations. Quoting *Gibbons* the *Lopez* court reaffirmed that "It is not intended to say that these words [of the commerce clause] comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State."

The Massachusetts Burma Law clearly falls into the class of activities which are "completely internal." As *Lopez* declared, allowing the federal government to regulate actions which are completely internal in the name of regulating commerce among the states or with foreign nations "would require this Court to pile inference upon inference in a manner that would bid fair to convert congressional Commerce Clause authority to a general police power of the sort held only by the States."

And quoting *NLRB v. Jones & Laughlin Steel (301 US 893)*, this Court in *Lopez* noted that the scope of the interstate commerce power

> must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

The same can certainly be said of the foreign commerce power as the interstate commerce power. To expand congressional power under this grant to include things which are either "indirectly" or "remotely" related to foreign commerce would effectively "obliterate the distinction between what is national and what is local."

3. The "speak with one voice" theory was never more than a metaphor, which, taken literally, could undermine important local expression.

The First Circuit's ruling with respect to the need of the federal government to "speak with one voice" is a preposterous extension of federal power which threatens to undermine scores of local actions.

The so-called "one voice" theory originated with *Michelin Tire v. Wages* (which is not even cited by the First Circuit opinion). In *Michelin (423 US 276)*, the phrase is used only once, and is clearly being used metaphorically:

> The Framers . . . committ[ed] sole power to lay imposts and duties on imports in the Federal

> Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power.[8]

Michelin, as with *Japan Line* (441 US 434) and *Container Corp (463 US 159)*, involved taxes which may have been, in effect, imposts. The phrase in *Michelin* was simply meant to say that imposts must be uniform throughout the United States. In *Japan Line*, decided the same year, the court made a bit greater use of the "speak with one voice" metaphor, but again the use was clearly metaphorical and not intended to be taken in any literal sense. Then, this Court in *Container Corp*. defined a bit more precisely what was meant by the "one voice" standard:

"The California tax does not violate the 'one voice' standard established in *Japan Line*, supra, under which a state tax at variance with federal policy will be struck down if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive."

Thus the Court made clear that, whatever, the "one voice" standard may mean, it does not prohibit all local actions which effect foreign policy or even which are at variance with federal policy, but only those "foreign policy issues which must be left to the federal

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[8] As noted above, the "sole power" to levy imposts stems from Art 1, sec 10, prohibiting such action to the States.

government" or those which violate a clear federal directive which has been constitutionally enacted.[9]

The First Circuit in making its "one voice" argument has expanded a metaphorical phrase into a full blown policy. The decision appeals to the "one voice" argument no less than 20 times -- rather astounding considering that *Michelin Tire* and *Container Corp* each use the phrase only once, and attach no particular importance to it. Moreover, the First Circuit seems to want to use the "speak with one voice" standard in a quite literal sense, meaning that state and local governments are prohibited from making any sort of protest over things related to foreign affairs.

The First Circuit opinion even calls into doubt the ability of state and local governments to adopt resolutions condemning the actions of foreign states. The opinion says in footnote 18 that "We do not consider here whether Massachusetts would be authorized to pass a resolution condemning Burma's human right record but taking no other action with regard to Burma." The clear implication of the opinion, however, is that even such resolutions run afoul of a literal "one voice" standard.

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[9] Some might try to argue that in the phrase "foreign policy issues which must be left to the United States," that "which must be left to the United States" should be taken as an apposition, that is "foreign policy issues, [comma] which must be left to the United States." That reading, however, is clearly precluded by the lack of a comma following "foreign policy." Grammatically then, "which must be left to the United States" must be taken as a limiting modifier of "foreign policy issues" and not as an apposition. The same conclusion follows from the use of the word "issues." While "foreign policy" per se must be left to the federal government, "foreign policy issues" is a wider, more amorphous, term encompassing "issues" which affect foreign policy but are not, properly speaking, foreign policy.

State and local governments have long been in the practice of passing resolutions with regard to issues of international importance, or with respect to treaties or international agreements being considered by the Congress. For example, a number of local governments last year passed resolutions opposing the Multilateral Agreement on Investment.

Local communities must remain free to comment on issues of international importance, especially issues which can affect local communities very directly. Local communities must be free not only to protest conditions, but to refuse to cooperate in activities which the community regards as immoral. As this Court noted in *Printz*, "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens." It is entirely proper, if not obligatory, that a State's policies, including purchasing decisions, should represent the values of its citizens. For example, a local government might adopt a policy that it would not do business with companies which use slave labor, or sweatshop conditions. This is a perfectly valid reflection of community standards, even though it might indirectly discriminate against foreign companies, since such working conditions are illegal in the United States.

This Court has correctly noted elsewhere that decisions about how to spend one's money is a form of speech. We often ask people to "Put their money where their mouth is" to show that their criticism is meant. It is hypocritical, at the least, to do business with a corporation which a community believes to be engaging in immoral practices.

Governors routinely negotiate with foreign leaders and foreign businesses about investing in their state. While they cannot sign treaties (at least, not

without Congressional sanction) semi-official negotiation might well be considered "meddling in foreign affairs reserved to Congress" or violating the "one voice" policy.

The actions or protests of local governments may embarrass the federal government. Protests may even oppose official US policy. For example, during the 1980's local governments formed sister-city relationships with Nicaraguan cities in protest of American involvement there. As *Container Corp* noted however, an action of a local government opposing US policy is not ipso facto unconstitutional, but only if it tramples on specific powers ceded to the federal government.

The "one voice" argument is dangerously close to the repudiated Alien and Sedition Acts which proclaimed that once the federal government made a decision about foreign policy that no one was free to criticize it. In a free society, we allow and encourage diverse voices on matters of public policy, we do not try to stifle them. And in our federal system, we encourage laws which represent diverse values, and experiment with diverse ways of addressing problems.

It should also be noted in passing that the "one voice" theory is internally inconsistent, since both Congress and the President (and now potentially the courts) all play a role in formulating federal foreign policy. *Curtiss* seems to suggest that the "one voice" belongs to the president, while *Michelin* suggests that voice belongs to Congress. The idea that the "federal government must speak with one voice on matters of foreign policy" is therefore impossible to realize, given our system of divided government and "check and balances."

CONCLUSION

In recent decisions such as *Lopez*, *New York v. US*, *Printz*, *City of Boerne*, *Alden*, *College Savings Bank* and others, this Court has embarked upon a path of upholding the independence of state and local government. All of these cases involved "a considerable congressional intrusion into States' traditional prerogatives" (*City of Boerne v Flores*). The current case is of a slightly different nature, but in the same line. This time it is not Congress which is attempting to intrude into State's traditional prerogatives, but the courts.

In some ways, however, interference by the courts is even worse. As this Court recently noted in *Alden*, "If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen" (*Alden v. Maine*).

It would be inconceivable, that at a time when this Court has fought so strongly against Congressional intrusions into local decision making, that it would allow a thousand unelected judges to exercise similar power.

Respectfully submitted,

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